Supreme Court, U.S.
FILED

97 869 NOV 24 1997

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No.

United States Supreme Court

October Term, 1997

T. CARLTON RICHARDSON,
Petitioner,

vs.

DISTRICT OF COLUMBIA BAR, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
to the
DISTRICT OF COLUMBIA COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIOTATI AND APPENDIX

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50pp

QUESTIONS FOR REVIEW

I.

Whether under the Fourth Amendment of the U.S. Constitution the general search and seizure of an attorney's bank records done in a bar disciplinary investigation by an enforcement officer (D.C. Bar Counsel) under a bar subpoena procedure that does not require the prior approval by a judge or magistrate is an exception to the "per se" unreasonable rule established in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct 2022 (1971), reh'g den., 404 U.S. 874, 92 S.Ct. 26 (1971)?

II.

Whether the due process guarantees under the Fourth and Fifth Amendments of the U. S. Constitution prohibit the exchange of financial information between two governmental agencies with unrelated attorney regulatory missions — the informant's being administrative (the D.C. Bar) and the recipient's being disciplinary enforcement (D.C. Bar Counsel) — without prior notice to the attorney provider where the information forms the basis of a bar disciplinary investigation?

III.

Whether petitioner's due process rights under the Fifth Amendment were denied where the appeals court granted summary affirmance of the federal district court's dismissal of the petitioner's civil rights complaint against bar enforcement officers for investigative misconduct upon grounds expressly reserved and not decided by the district court?

LIST OF PARTIES

The parties to these proceedings are as follows:

Petitioner

T. CARLTON RICHARDSON

Respondents

(1) DISTRICT OF COLUMBIA BAR an unincorporated association established by the District of Columbia Court of Appeals, a part of the judicial branch of the District of Columbia Government;

(2) LEONARD H. BECKER is an employee of the District of Columbia Bar serving as D.C. Bar Counsel, the prosecutorial arm of the D.C. Board on Professional Responsibility, an agency of the District of Columbia Court of Appeals;

(3) DONNA M. DeSILVA is an employee of the District of Columbia Bar serving as an assistant D.C. Bar Counsel;

(4) GARLAND PINKSTON, JR., is an employee of the District of Columbia Court of Appeals in the position as Clerk; and

(5) SIGNET BANK is a corporation doing business in the District of Columbia providing banking and other financial services.

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*U.S. Const., 4th Amd.— i, 3, 7, 9, 11, 12, 13, 15, 16, 21, 25, 29
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*Gouled v. United States-- 13, 16
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Ward v. Village of Monroeville—
409 U.S. 57, 93 S.Ct. 80 (1972)
Whalen v. Roe— 15, 16
429 U.S. 589, 97 S.Ct. 869 (1977)

III. Other References.

Bogert, Law of Trusts, Sec. 141
(5th Ed., 1973)— 23

DECISIONS FOR REVIEW

The following decisions of the federal district and appeals courts set-out in the Appendix (Appx.) are presented for review:

District Court Decisions

(1) An oral opinion in T. Carlton Richardson v. District of Columbia Bar, et al., No. CA 96-02286 (01/10/97, Sporkin, J.) [Transcript 12:4-40; 13:2-3]. Appx. 3.

(2) The written order in T. Carlton Richardson v. District of Columbia Bar, et al., No. CA 96-02286 (01/13/97, Sporkin, J.). Appx. 4

Court of Appeals Decisions

(1) An order granting summary affirmance in T. Carlton Richardson v. District of Columbia Bar, et al., No. 97-7051 (D.C. Cir., 06/30/97, Wald, Rogers, and Tatel, C.J.). Appx. 6.

(2) An order denying a petition for rehearing in T. Carlton Richardson v. District of Columbia Bar, et al., No. 97-7051 (D.C. Cir., 06/03/97, Wald, Rogers, and Tatel, C.J.). Appx. 9.

JURISDICTIONAL STATEMENT

Jurisdiction of the U.S. Supreme Court to review a final judgment or order in a civil case of a federal appeals court is by grant of a timely filed petition for writ of certiorari. See, 28 U.S.C. Sec. 1254(a). A petition for writ of certiorari must be filed within 90 days of the entry of the appeals court judgment or order sought to be reviewed, or, if timely filed, the disposition of a petition for rehearing, whichever is greater. See, S.Ct.R. 13(1) and 13(3).

Petitioner files his petition for writ of certiorari within 90 days of the entry of a final order denying a timely filed motion for rehearing of an order granting summary affirmance entered by the U.S. Court of Appeals for the D.C. Circuit in T. Carlton Richardson v. District of Columbia Bar, et al, No. 97-7051 on September 3, 1997, the deadline being December 2, 1997. Jurisdiction of this Court has been properly effectuated to consider a review of the final appeals court decision in that civil rights case.

STATUTORY PROVISIONS INVOLVED
(Constitutions, Statutes, Regulations/Rules)

U.S. Constitution, 4th Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or thngs to be seized.

U.S. Constitution, 5th Amendment:

No person ... shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF CASE

I. Background

By letter of inquiry dated July 1, 1996 respondent DeSilva an assistant D.C. Bar Counsel commenced an investigation of the petitioner, an attorney subject to the disciplinary jurisdiction of the D.C. Court of Appeals (DCCA), for misconduct related to the "possible misuse of entrusted funds". This investigation was based upon printed information contained on a copy of petitioner's $65.00 (Sixty-Five Dollar) check from his bank account titled "Dr. T. Carlton Richardson, J.D., LL.M. (Special Trust Account)". Drawn to the order of the D.C. Bar on June 20, 1996, the check was for payment of the charge for a continuing legal education (CLE) course set for June 25, 1996 sponsored by a joint venture CLE program comprising the D.C. Bar and George Washington University Law School which is administered by the D.C. Bar employees.

Surreptitiously, on or about June 22, 1996, without giving petitioner any prior notice or obtaining his consent, a D.C. Bar employee involved with the CLE Program provided a copy of petitioner's check to the D.C. Bar's Office of Bar Counsel after consultation with the Deputy D.C. Bar Counsel which triggered the investigation into possible misconduct by petitioner. Petitioner's check was later negotiated by the D.C. Bar, its payee, on or about June 24, 1996 and he participated along with ten to fifteen others in the course.

Contemporaneous with the letter of inquiry to petitioner on July 1, 1996 and based upon information contained on the petitioner's CLE check, D.C. Bar Counsel (respondent DeSilva) also caused to be issued by the Clerk of the DCCA a subpoena duces tecum pursuant to subpoena procedures in D.C. Bar disciplinary investigations to respondent Signet

Bank for petitioner's personal bank records. See, D.C. Bar Rule XI, Sec. 18 (Subpoenas). This subpoena procedure permits unreviewed discretion in any prosecutor in the Office of D.C. Bar Counsel to issue such subpoenas during investigations. Supoenaed was not only copies of bank records for the specific bank account evidenced by a copy of petitioner's CLE check but also, as the subpoena stated, "full compliance with [the] subpoena require[d] records for all accounts held in the name [of petitioner]" at the bank.

Furthermore, discovery was commenced although prohibited under the D.C. bar disciplinary rules until the accused attorney has had an opportunity to respond to the letter of inquiry. See, D.C. Bar Rule XI, Sec.(a)(2) which provides that

> (N)o disposition shall be recommended or undertaken by Bar Counsel until the accused attorney shall have been afforded an opportunity to respond to the allegations.

Petitioner had until July 31, 1996 to respond to the July lst letter of inquiry.

Sometime in August, 1996, respondent Signet Bank provided copies of petitioner's bank records for the period requested under the July 1, 1996 subpoena issued by D.C. Bar Counsel. Petitioner pays the bank to have his cancelled checks returned and not kept by the bank, however, under federal banking laws the bank is required to keep custody of copies of all petitioner's bank transactions which the bank does electronically. As custodian of petitioner's bank records, the bank did not notify him of its receipt of the July 1, 1996 subpoena or its decision to comply.

After an undisclosed review and audit of

petitioner's secretly obtained bank records the investigating prosecutor (respondent DeSilva) in the Office of D.C. Bar Counsel issued on October 1, 1996, a subpoena duces tecum to the petitioner for production of "all documents pertaining to" some 18 (eighteen) individuals or entities involved in various transactions on petitioner's bank account for a stated period. Petitioner being shocked and surprised by the issuance of the subpoena surmised that somehow D.C. Bar Counsel's investigating prosecutor had obtained access to his personal bank records and feeling that his civil rights had been violated in the investigative process filed a complaint on October 2, 1996 in the U.S. District Court for the District of Columbia naming as defendants, the respondents herein: District of Columbia Bar (created by the DCCA in 1972 is currently the second largest unified Bar in the United States with over 65,000 dues paying members), Leonard H. Becker (D.C. Bar Counsel), Donna M. DeSilva (Assistant D.C. Bar Counsel and investigating prosecutor), Garland Pinkston, Jr., (Clerk, DCCA and the officer issuing the subpoenas involved herein), and Signet Bank (individually and as a private state actor). [After filing his complaint, petitioner reluctantly and unsuccessfully sought to implead the joint venturer in the CLE program, George Washington University Law School of which he is an proud alumni, individually and as a private state actor.]

II. Judicial Proceedings

A. Before Federal District Court.

Upon consideration of dispositive motions filed by the various respondents to the civil rights complaint and petitioner's opposition thereto the federal district court following a hearing in January, 1997 entered a bench opinion dismissing the case as to all parties. See, Transcript at Appx. 3. By written order entered January 13, 1997, the

district court dismissed the case as to all parties for lack of jurisdiction and abstention (a failure of plaintiff to exhaust state remedies). See, Order at Appx. 4

B. Before Federal Appeals Court.

On appeal, cross-motions for summary disposition were submitted by the parties, one for reversal by the petitioner arguing the existence of civil rights jurisdiction and the inapplicability of abstention to this kind of civil rights action against bar disciplinary enforcement officers and the other for affirmance by the appellees for lack of jurisdiction and for failure to state a claim upon which relief could be granted. The federal appeals court summarily affirmed. See, Order at Appx 6. Petitioner's motion and petition for rehearing were denied. See, Order, Appx. 9. From the appellate dispositions summarily affirming the district court's dismissal of petitioner's civil rights complaint issuance of a writ of certiorari is sought.

C. Sources of Original Federal Jurisdiction.

That the original jurisdiction of the federal district court to enforce civil rights actions lies in the Constitution of the United States' Privilege and Immunities Clause of Article IV, Section 2, Clause 1 ["(t)he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"], its Search and Seizure Clause of the 4th Amendment, and its Due Process, Self-Incrimination and Taking Clauses of the 5th Amendment, which are all self-executing. Federal statutes provide original jurisdiction in the district court as follows: (1) 28 U.S.C. Sec. 1331 giving "original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States", 42 U.S.C. Sec. 1343(a)(3) giving jurisdiction for deprivation of

civil rights and Sec. (a)(4) to allow recovery of damages or to provide injunctive relief under congressional civil rights acts; (2) 42 U.S.C. Sec. 1983 [for deprivation of rights by "(a)ny person ... under color of" state law, custom or usage]; and (3) 42 U.S.C. Sec. 1988 giving jurisdiction for proceedings in vindication of civil rights and allowing the award of attorney fees.

REASONS FOR WRIT

Introduction

Once again this Court is called upon to act as the guardian of a citizen's civil rights. Who would think that an innocent act by petitioner of seeking to increase his legal knowledge would result in his being subject to an unreasonable search and seizure of his bank records to procure evidence upon which D.C. Bar enforcement officers intended to base a charge of professional misconduct? But this is exactly what happened as the foregoing Background section reveals.

This petition brings before the Court disturbing facts of how D.C. Bar disciplinary enforcement officials abused their investigatory authority. Such investigatory misconduct (use of defective subpeona procedures and unauthorized exchange of information) complained the petitioner in the federal district court violated his civil rights under the U.S. Constitution and federal statutes by depriving him of rights and protections under the 4th Amendment (search and seizure) and 5th Amendment (due process, self-incrimination and taking clauses), the Privilege and Immunities Clause of Article IV, Sec. 2 (incorporating the due process clause of the 14th Amendment), 42 U.S.C. Secs. 1983 (deprivation of civil rights under color of state law, regulation or custom), state procedural due process and equal protection rights secured by regulations and policies governing the D.C. Bar in its administrative and disciplinary enforcement activities, state common law rights to privacy or the tort of intrusive investigation, and breach of contract or the failure by petitioner's bank to disclose relevant information as custodian of his bank records such as the receipt of the subpoena involved in the bar disciplinary investigation.

I. Case is Writworthy on Merits

A. Unconstitutionality of Bar Subpoena Procedures.

1. Per Se Violation of 4th Amendment.

Disciplinary proceedings are quasi-criminal [In re Ruffalo, 390 U.S. 544, 551, 88 S.Ct. 1222, 1226 (1968)] and thus are subject to the strictures of the 4th Amendment that legal process sought to invade the privacy of an attorney must first be reviewed and approved by a neutral judicial officer. Never has the U.S. Supreme Court sustained a search upon the sole ground that those executive officers charged with investigative or prosecutorial duties reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. See, United States v. U. S. District Court, 407 U.S. 297, 317, 92 S.Ct. 2125, 2136-2137 (1972). Neither can a prosecutor's oath furnish probable cause for issuance of a warrant, for this must be determined by someone independent of the prosecution to be valid. Grestein v. Pugh, 420 U.S. 103, 95 S.Ct. 854 (1975).

In Coolidge, this Court established a "per se" disqualification rule regarding prosecutors determining probable cause for issuance of a search warrant or subpoena duces tecum holding:

> that searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.
>
> Id., 403 U.S. at 454, 91 S.Ct. at 2032. [Internal quotation marks omitted.]

Even the D.C. Court of Appeals itself, consistent with well established 4th Amendment jurisprudence, recognized the necessity for its Board on Professional Responsibility when conducting investigations into an attorney's financial records to obtain an administrative warrant under Rule 204 of the D.C. Superior Court Rules of Civil Procedure instead of the subpoena procedure under the disciplinary rules employed by D.C. Bar Counsel here. See, In re Malvin, 466 A.2d 1220 (D.C., 1983). D. C. Bar subpoena procedures permitting as it does unreviewed executive discretion in Bar Counsel is unconstitutional under the 4th Amendment since there is no restraint imposed by a detached and neutral magistrate and thus issuance of the illegal subpoenas to the petitioner's bank and to the petitioner himself violated his civil rights.

Independent judicial review is required under the 4th Amendment to avoid the potential invasion of a suspect's privacy that can result from "unreviewed executive discretion." See, United States v. Miller, 425 U.S. 435, 445 n.6, 96 S.Ct. 1619, 1625 n.6 (1976) [One's expectancy for privacy in bank records is no defense to a valid subpoena for those records.] In Miller, an I.R.S. subpoena enforcement action, it was assumed that the access to the bank records of the depositor was pursuant to "existing legal process", it being noted by the Court:

> Here the Government has exercised its powers through narrowly directed subpoenas duces tecum subject to legal restraints attendant to such process. [Emphasis supplied.] Id.

But where the issuance of a subpoena violates the 4th Amendment's requirement of a finding of probable cause for issuance by the detached judgment of a neutral magistrate, the expectancy of privacy of one's bank records is justified. See, Id. at 425

U.S. at 441 n. 2, 96 S.Ct. at 1623 n. 2 [A depositor's 4th Amendment interest comes into play when a defective subpoena is used to obtain bank records.] See also, Marshall v. Barlow's Inc., 436 U.S. 307, 315, 98 S.Ct. 1816, 1822 (1978) where this Court stated:

> the customer of a bank expects that the documents, such as checks, which he transmits to the bank in the course of his business operations will remain private, and that such expectation is reasonable ... . A bank customer's reasonable expectation is that, absent compulsion by legal process, the matters he reveals to the bank will be utilized by the bank only for internal banking purposes. [Internal quotes omitted.]

Furthermore, a subpoena procedure lacking some disclosure requirement would be unconstitutional under the 5th Amendment because a bank depositor under investigation in a government forfeiture proceeding (which includes bar disciplinary investigations) can make due process objections on grounds of "overbreath" whether the subpoena seeks a depositor's bank records directly or from a third party custodian such as a bank or other financial institution [see discussion infra "Subpoenas Invalid as Overbroad"]. Use by the D.C. Bar's disciplinary enforcement officers of a subpoena procedure unconstitutional under the 4th and 5th Amendments violated the petitioner's civil rights and is actionable.

2. Subpoenas Invalid as Overbroad

In this case, D.C. Bar Counsel made use of an invalid D.C. bar subpoena procedure permitting unreviewed discretion in issuing subpoenas for petitioner's bank records. Subpoenaed from the

petitioner's bank were "all accounts in name of T. Carlton Richardson" which was overly broad and could have been challenged as such by the petitioner had he known of the subpoena's existence beforehand.

Without any review either by a judicial officer ex parte or in adversary proceedings to enforce the subpoena prior to service upon petitioner's bank, copies of his records were surrendered to D.C. Bar Counsel for audit. Petitioner's right to privacy under the 4th (unreasonable search and seizure) and 5th (self-incrimination and due process clauses) Amendments were thereby violated thus giving him a cause of action against the bar enforcement officers and their private actors under the Constitution and civil rights laws of this nation.

Fruits of an illegal search and seizure cannot be used as a basis for issuance of a subpoena to conduct a "fishing expedition" into the personal and business affairs of the petitioner. Gouled v. United States, 255 U.S. 298, 306, 41 S.Ct. 261, 264 (1921); Bowman Dairy Co v. United States, 341 U.S. 214, 71 S.Ct. 675 (1951) A subpoena containing "catch-all provision not intended to produce evidentiary materials but ... a 'fishing expedition'" is invalid. Id. Forcing petitioner to surrender financial information and business records based upon Bar Counsel's audit of this bank records as occured here was improper also. Lacking fundamentals of due process — notice and opportunity to be heard — petitioner's civil rights were infringed by the respondents permitting recovery for petitioner's losses in federal civil rights laws.

3. Investigative Misconduct as Basis for Civil Rights Action

It is well established that civil rights actions against prosecutors for investigative misconduct are permissible. See, Gray v. Bell, 712

F.2d 490 (D.C. Cir., 1983); McSurely v. McClellan, 697 F.2d 309 (D.C. Cir., 1982) [Involving an illegal search warrant.]; Briggs v. Goodwin, 589 F.2d 10 (D.C. Cir., 1977), cert den. 437 U.S. 904, 98 S.Ct. 3089 (1978); Apton v. Wilson, 506 F.2d 83, 91 (D.C. Cir., 1974) [Immunity not available to prosecutor when claim of civil rights violation in connection with prosecutor's action in directing investigative activities.] Likewise, it is settled that when a private actor acts in concert or conspiracy with a state official, the combined activity constitutes state action and activity under color of law rendering the private actor liable under Sec. 1983, even if the public official enjoys immunity. Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183 (1980); Adickes v. S.H.Kress & Co., 398 U.S. 144, 90 S.Ct. 1598 (1970); United Steelworkers of America v. Phelps Dodge Co., 865 F.2d 1539 (9th Cir., 1989), cert den. 493 U.S. 809. 110 S.Ct. 51 (1989); Kadivar v. Stone, 804 F.2d 635, 637 (11th Cir., 1986); Apton.

Dismissal by the federal district court for lack of subject matter jurisdiction and under the abstention doctrine and the appeals court's summary affirmance stand alone against the overwhelming weight of authority to the contrary that civil rights actions may be brought against bar enforcement officers for investigative misconduct. Their decisions in this case should be brought into uniformity with this unquestioned view in an important area of federal law dating back to the Civil War in the 1860s.

B. Interagency Information Exchange Unconstitutional

Petitioner further contends that D.C. bar officials made an unauthorized exchange of financial information contained on a check given by him for a CLE course which precipitated the premature and surreptitious issuance of an invalid subpoena to his

bank. It has been recognized by this Court that notions of due process contained within the 4th Amendment safeguard individuals from unwarranted governmental intrusions into their personal lives. Whalen v. Roe, 429 U.S. 589, 598 n. 23, 97 S.Ct. 869, 876 n. 23 (1977). This right to privacy actually encompasses two separate types of interests,

> (o)ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions. Id.

The purpose of prior judicial reivew for searches and seizures is

> [t]o implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy ... whenever possible. Gerstein, 420 U.S. at 111, 95 S.Ct. at 862

It is the "unfounded invasions of liberty or privacy" that is protected by the 4th Amendment, not the person subjected to the invasion. Mitchell v. Forysth, 472 U.S. 511, 105 S.Ct. 2806, 2809 (1985) Thus, a complainant's 4th Amendment rights are violated when a warrantless search and seizure is accomplished without his knowledge in an unrelated investigation even if the information is not used to commence charges against him. Id.

Was there a violation of the petitioner's 4th and 5th Amendment due process rights in the surreptitious search and seizure of the petitioner's bank records kept pursuant to federal regulations and identified through the use of information exchanged between governmental agencies under a subpoena procedure which allows such production without prior review by a judicial officer? Citing

as authority the Miller case, which holds that bank records are not immune from seizure pursuant to a valid legal process under the 4th Amendment, the federal appeals court held that petitioner had no legitimate expectancy of privacy in the check tendered and thus the exchange of information and its use in subpoenaing petitioner's electronic bank records were permissible. Appx. 7. Such a conclusion by the appeals court shocks the conscience and is indefensible.

It has long been held by this Court that the 4th Amendment is violated by secret and general ransacking and seizure of private papers, notwithstanding the initial intrusion was occasioned by an invitation obtained by misrepresentations rather than by force or stealth. Gouled, supra. An unjustified search of a businessman's financial records violates his constitutional right to privacy. Marshall, 436 U.S. at 312, 98 S.Ct. at 1820.

Thus, where financial information contained on the face of a check given by the account holder for legitimate business purposes to one governmental agency this does not open up the records and the financial information contained in the holder's account to another governmental agency who received a copy of the check without the holder's knowledge or consent unless prior judicial review of the subpoena was obtained. As this Court observed in Whalen, 429 U.S. at 605, 97 S.Ct. at 879:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive governmental files. ... The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory

> duty to avoid unwarranted disclosures ... . [I]n some circumstances that duty arguably has its roots in the Constitution. (Emphasis supplied)

Since the D.C. Bar's subpoena procedure permits unreviewed discretion in D.C. Bar Counsel when conducting discovery through subpoenas duces tecums, due process under the 5th Amendment requires that she must notify the subject of the investigation, otherwise, the subject's due process rights are violated for

> (w)here the state is allowed to act secretly behind closed doors and without any notice to those who are affected by its actions, there is no check against the possibility of ... "arbitrary actions". Bd. of Regents v. Roth 409 U.S. 564, 98 S.Ct. 2706, 2712 (1972)

Federal and state governments or their agencies are restrained by the Constitution from acting arbitrarily. The Government may only act fairly and reasonably. Absolute and uncontrolled discretion invites abuse.

Investigations conducted by bar enforcement officers into the bank records of a bar member must either have prior judicial approval or the member must be given prior notice and an opportunity to object in order not to violate the member's due process protections under the 4th and 5th Amendments. Having violated the petitioner's civil rights in that regard, the D.C. Bar's enforcement officers are liable in damages for the deprivation under their unconstitutional subpoena procedures.

C. Appellate Proceedings Violate Due Process

Although civil rights actions against bar enforcement officials are not precluded because the unconstitutional conduct arose out of their enforcement activities under the aegis of a judicial regulator, the federal appeals court summarily affirmed the district court's dismissal on grounds that the complaint failed to state a cause upon which relief could be granted, a ground expressly reserved and undecided by the district court. Appx. 4 [The district court judge stated that "[petitioner] may well have a good claim. I'm not deciding that. But I am deciding (petitioner's) in the wrong court."] Appx. 7

Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure. Lankford v. Idaho, 500 U.S. 110, 111 S.Ct. 1723 (1991). In a variety of contexts, this Court's cases have repeatedly emphasized the importance of giving the parties sufficient notice to enable them to identify the issues on which a decision may turn. E.g. Id. (sentencing in criminal case); Burns v. United States, 501 U.S. 129, 111 S.Ct 2182 (1991) (same); Fountain v. Filson, 336 U.S. 681, 69 S.Ct. 754 (1949) (per curium) [appellate procedure]. Without notice a court is denied the benefit of the adversary process. Burns And where the adversary process is not permitted to function properly, there is an increased chance of error and with that the possibility of an incorrect result. Id.

In Fountain this Court held that an appellate court should not reverse a summary judgment order and give judgment for the nonmoving party on the basis of an issue that the movant had no opportunity to meet in the district court since the movant would be deprived of the opportunity to dispute any of the facts that were material to the claim that was not

considered by the district court. But contrary to the Fountain holding, the appeals court in this case reviewed the petitioner's complaint (no consideration was given to petitioner's responsive pleadings and affidavit filed in the district court proceedings which may have contained factual allegations supporting his stated or other claims for relief) and concluded sua sponte that petitioner failed to state a claim upon which relief could be granted for certain common law claims.

In Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99 (1957) this Court stated the "accepted rule" in assessing the legal sufficiency of a complaint:

> that the complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

The federal appeals court concluded that beyond a reasonable doubt and to a legal certainty petitioner's complaint (and other pleadings) could not support any civil rights or common law claims for relief and therefore summary affirmance was appropriate. It did this although the district court specifically reserved and did not decide the legal sufficiency of the complaint but based its decision on lack of jurisdiction and abstention grounds.

Federal practice is notice pleading with discovery being used to develop the case facts underlying the legal claims. Here, petitioner was denied an opportunity to present facts to support other claims for relief under the federal civil rights laws for state-based due process violations and common law causes of action for investigative misconduct. The federal appeals court in this instance through this unusual appellate factfinding

process and divination denied the petitioner his due process rights. This Court should exercise its supervisory powers of correction to avert the arbitrary misuse of the summary disposition process by this and other federal appeals courts.

II. Case is Writworthy Under Review Standards

A. Unconstitutionality of Bar Subpoena Procedures

D.C. Bar's subpoena procedures in disciplinary investigations are challenged primarily on the grounds (1) that they permit in blatant contravention of the 4th Amendment's clear, unquestioned and longstanding requirements which prohibit unreviewed discretion in the issuance of subpoenas by executive officers or prosecutors and (2) that they fail to require adequate and timely notice and an opportunity to be heard prior to the issuance of illegal or overly broad subpoenas. Such actions on the part of D.C. bar enforcement officers petitioner contends violated his due process guarantees founded in the 5th Amendment and the Privilege and Immunities Clause (incorporating the 14th Amendment due process guarantees). This departs from the accepted and usual course of bar disciplinary proceedings which are civil forfeiture or quasi-criminal and should be corrected by this Court.

There is no independent check in bar disciplinary proceedings upon the judicial regulator since it performs all the functions of regulation: legislative, bar enforcement (executive), and judicial (individual case adjudication). Since the checks and balances inherent in our system of government do not operate within this attorney regulatory context this Court should be especially vigilant where constitutional challenges are made for fear that small encroaches upon important constitutional rights such as the liberty, property and privacy issues raised here do not become the norm and adopted nationally in reliance upon the federal appeals court ruling since the D.C. Bar is the second largest in the country with over 65,000 members most of whom hold dual bar memberships and

practice outside the District of Columbia.

A depositor contracts (a property interest) with a bank which is required under federal bank law and regulations as a custodian to keep electronic records of all the depositor's bank transactions for a specific period of time, records which the depositor himself creates, and, as this federal appeals court applying dicta in Miller has held, the depositor has no right (a chose in action, i.e. a property interest) to prevent an unlawful seizure or disclosure of those records (or the financial information contained therein). In other words, financial information generated by a depositor becomes ipso facto the property of the banking institution once inputed into the bank's computers and the bank can do with it what it pleases! This Court never intended the Miller decision to be used as a vehicle for transferring ownership of bank records from a depositor to the bank or for justifying the use of illegal procedures to access a depositor's account.

This Court should take this opportunity to make clear once again that a bank depositor can claim due process protections of his bank records under the 5th Amendment as well as under the 4th Amendment. Otherwise this Court becomes a silent partner with the lower federal trial and appellate courts in allowing the legitimate use of the government's police powers in requiring retention of bank records without a depositor's consent — although the depositor voluntarily opened the account and put his financial transactions through it — to be perverted by unauthorized access either in quasi-criminal government forfeiture proceedings or even in civil actions by litigants in discovery or judgment creditor collection proceedings.

One's electronic bank records are no less intellectual or intangible personal property as one's ideas for inventions, slogans, trademarks, and

the like which are protected by copyright laws. Those records tell the story of the depositor: his or her religious beliefs, political affiliations, reading habits, or sextual proclivities.

To deny due process protections of one's bank records on grounds that after the records are electronically encoded into computers of a bank who obtains the information from the depositor that the depositor has no proprietary interest in protecting the wrongful disclosure is no less a taking of property than the government seizing one's house that was built by the owner's own hands on land which the owner brought and developed for public use without notice, opportunity to be heard or compensation. Let us not forget what precipitated the Revoluntary War: use of such uncontrolled and highhanded tactics by government tax collectors to access the business establishments and homes of Colonist.

If due process has any meaning at all, it means that a citizen should be given a meaningful opportunity to participate in proceedings which involve the deprivation of a valuable property interest. Even under normal contract or trust principles a party to a contract who is a custodian has a fiduciary duty to disclose information which would impair or deprive the other contracting party or beneficiary of the custodianship of a valuable right under the contract. See, generally, Bogert, Law of Trusts Sec. 141 ("Duty to Furnish Information to the Beneficiary") (5th Ed., 1973).

But here, the federal appeals court has ruled that when the public's interest is being represented by D.C. Bar Counsel in disciplinary investigations, financial records and information contained in a bar member's bank account must be yielded upon demand in the sole and unreviewed discretion of Bar Counsel since the member has no property interest in the

account, that interest having beem surrendered or extinguished at some point in the banking relationship by operation of law to the bank without notice or opportunity to be heard regarding this deprivation or compensation being paid.

There are instances when an otherwise permissible investigation can become tortious whether performed by a public official or private individual or both in concert. In one case, a cause of action for invasion of privacy was stated where an investigator employed subterfuge to gain entry into the plaintiff's hospital room and secured information from her concerning her claim against the investigator's employer by further deception. See, Noble v. Sears, Roebuck & Co., 33 Cal. App. 3d 654, 109 Cal. Rptr. 269 (1973). This gave rise to a cause of action for intrusive investigation. Id. But the federal appeals court under the facts of this case involving deceptions and misrepresentations by D.C. Bar enforcement officials held that there was no cause of action for a civil rights violation and that "the allegations in the complaint provided no basis to impose common law tort liability upon the appellees ..." Appx. 7-8.

This Court has never permitted the unreviewed executive discretion of a prosecutor to subpoena the bank records of a citizen. This Court has stated that this is a per se violation of the 4th Amendment. This Court has consistently held that due process requires notice and an opportunity to be heard whether proceedings are overseen by the executive, legislative or judicial branches of government. This Court has even held that federal appellate courts are not immune from due process requirements when reviewing cases on appeal.

Not granting certiorari here would validate violations in this case, one by state judicial bar enforcement officers of the second largest bar association in the nation and the other by federal

appeal court judges who sua sponte and summarily tried the petitioner's civil rights case. No person in or institution of government, whether legislative, executive or judicial is above the law, especially our civil rights laws.

B. Interagency Information Exchange Unconstitutional

Investigation of disciplinary misconduct must be accomplished by bar enforcement officers within the strictures of the 4th Amendment's unreasonable search and seizure provision and the 5th Amendment's due process provision because in this case a valuable right, a license to practice law, is involved. Collecting information is an important function of government in the performance of its myriad of duties and responsibilities especially is regulatory and security matters.

Moreover, the right of a citizen to be free from unauthorized intrusion into his personal and private life is unquestionably a valuable liberty interest protected by the due process requirements of the 4th Amendment (the independent determination of probable cause by a judicial officer) and 5th Amendment (a meaningful notice and opportunity to be heard). A citizen should not have to be concerned when dealing with his government that information provided for legitimate purposes will be disclosed for unauthorized purposes, misused or misappropriated.

It is a crime for a government employee to take information in the normal course of the government's activities and disclose that information to others outside the government, whether for profit or not. Likewise, it stands to reason that an unauthorized exchange of information between governmental agencies is also prohibited unless prior notice is made of the exchange. Government must act fairly when dealing with its citizens whom it serves as trustee and guardian of the people's best interest

especially if a governmental benefit, privilege or license is involved as here.

While the Framers of the Constitution could not have envisioned such a governmental bureaucracy that exists today and such a massive collection of information by government agencies and their operatives affecting the private lives of most citizens, the Constitution is not impotent to deal with the misuse of legitimately obtained governmental information which may adversely affect the property interest of a citizen in civil forfeiture or quasi-criminal proceedings. In the 4th Amendment the Constitution as interpreted by this Court requires executive officers obtain civil or criminal warrants or subpoenas with the prior approval of an independent judicial officer as a prerequisite for undisclosed access to a citizen's bank records. Additionally, the 5th Amendment requires that executive officers in obtaining discovery by warrants or subpoenas act reasonably and that the information sought relate to the subject matter of the investigation and not be overly broad.

But where, as here, the government's executive officers have exchanged information without obtaining proper judicial approval as the 4th Amendment requires in a bar disciplinary or quasi-criminal investigation under circumstances where the accused attorney provided the information to the informing agency for legitimate purposes and was lead to believe that it would be used for that purpose and that purpose only (and was in fact used for that purpose), the information exchange must be justified by a prior notice coupled with a meaningful opportunity to be heard in opposition by the provider (accused attorney) as required by the 5th Amendment. Fourth Amendment strictures provide "checks upon such official deception for the protection of the individual". Lewis v. United States, 258 U.S. 206, 209, 87 S.Ct. 424, 426 (1966)

Fifth Amendment guarantees are designed to prevent an unauthorized exchange or misuse of the information provided, especially, as here, where the exchange may result in the accused attorney being deprived of his license to practice law or being subjected to criminal sanctions and the irrevocable surrender of valuable constitutional rights. In related bar disciplinary proceedings D.C. Bar Counsel obtained a contempt citation against the petitioner for failing to comply with the October 1, 1996 subpoena and the imposition of a one year jail term which was vacated when the petitioner surrendered the documents subpoenaed. See, In re T. Carlton Richardson, No. 96-2550 (DCCA, 07/10/97). People should not be suspect or distrustful of their government, but secretive activities such as those described in this case fosters such an attitude. This Court should not permit the erosion of the public trust.

C. Appellate Proceedings Violate Due Process.

Use of the summary disposition procedure by the appeals court in this case was irregular and flawed. Not only did the appeals court adjudicate facts on dispositive motions, but it also summarily decided the appeal upon an issue not decided in the district court without according the petitioner his due process rights, notice and opportunity to be heard.

Where an appellate court has violated the due process rights of a party there is no other recourse than to seek correction by this Court for

> (t)he supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied, and whether the proceedings in which facts were adjudicate was conducted regularly. St. Joseph Stock Yards

Co. v. United States, 298 U.S. 38, 84, 56 S.Ct. 720, 740 (1936) [Justice Brandeis, concurring.]

Exercise of this Court's supervisory authority is appropriate and the Writ should issue for that purpose also.

III. Conclusion/Relief Sought

Investigations conducted in bar disciplinary proceedings are not excepted from the "per se" unreasonable rule under the 4th Amendment that if probable cause is not determined by an independent judicial officer before issuance of a subpoena duces tecum for an attorney's bank records it is invalid. Subpoena procedures in D.C. bar disciplinary investigations which permit unreviewed executive discretion in its Bar Counsel when issuing subpoenas is unconstitutional under the 4th Amendment. In this case the challenged subpoenas both to the petitioner's bank and then to himself based upon the previously subpoenaed bank records are also unconstitutional under the 5th Amendment's Due Process Clause as being overly broad and the Self-Incrimination Clause for requiring compelled testimony regarding information and records in the possession of the petitioner.

A citizen's constitutional privacy right is the basis for allowing reasonable due process procedures to prevent the unauthorized use of information provided the government. Exchange of information between government agencies whose functions are unrelated without the provider's consent or prior knowledge and opportunity to contest the exchange violates the provider's due process rights if a property interest of the provider, in this case petitioner's law license, will be adversely affected. Use of financial information provided by a sister agency to bar disciplinary enforcement officers which was used to subpoena an attorney's bank records without his knowledge or consent and without the prior approval of a judicial officer, violates the attorney's due process rights under the 4th and 5th Amendments.

Appellate procedures involving summary affirmance of the district court's dismissal on grounds not considered in the district court

violates the petitioner's due process rights. This case is writworthy because the constitutional principles involved here have been clearly established by this Court and their violations by the governmental officers were unjustified and evidenced a patent disregard of fundamental rights of liberty and property which form the very foundation of our republican form of government and the cherished Constitution under which it is governed.

Moreover, the exercise of this Court's supervisory authority is necessary to assure that appellate procedures are fair and just. The disposition and management of government information obtained legitimately from citizens being an important part of the commercial life of the nation requires that this Court speak definitively regarding the consequences to government agencies who improperly exchange information collected from citizens and to prosecutors in civil forfeiture or quasi-criminal proceedings who issue overly broad subpoenas without prior judicial approval for sensitive information. Issuance of the Writ is therefore imperative and appropriate being supported in law and reason.

Relief Sought. Grant of this Petition for Writ of Certiorari is requested for the reasons stated for review of the U.S. Court of Appeals for the D.C. Circuit's order affirming the dismissal of petitioner's civil rights complaint; and for such further relief as the court deems necessary and proper.

Respectfully Submitted,

T. CARLTON RICHARDSON
Petitioner Pro Se
1505 Pennsylvania Ave., SE
Washington, DC 20003-3117
202/347-4466

No.

United States Supreme Court

October Term, 1997

T. CARLTON RICHARDSON,
Petitioner,

vs.

DISTRICT OF COLUMBIA BAR, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
to the
DISTRICT OF COLUMBIA COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX

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LOWER COURT DECISIONS

I. FEDERAL DISTRICT COURT.

A. Oral Opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

T. CARLTON RICHARDSON,	)	
Plaintiff,	)	
vs.	)	No. CA 96-02268 (SS)
DISTRICT OF COLUMBIA BAR, et al.	)	Washington, DC
Defendants.	)	January 10, 1997 2:25 PM

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE STANLEY SPORKIN
UNITED STATES DISTRICT JUDGE
[Pages 12, lines 4-20 and 13, lines 2-3]

... I'm going to dismiss this case, and I find that it should not have been brought in this Court. And I think, Mr. Richardson, you should have known that it shouldn't have been brought in this Court. Three is no motion for sanctions in this case, and, I therefore, I'm just dismissing this case.

But I must tell you that keep filing cases like this, and if the other side starts moving under Rule 11, I'm going to start considering it. I just don't think that this kind of case here should be in this Court. this is a case involving your matters with the D.C. Bar, and the D.C. Bar has got to be the person that has got to litigate. You cannot go and

jump over and bring this into a federal court before you've gone over there and have taken your matters to them. They have the first responsibility here.

You may well have a good claim. I'm not deciding that. But I am deciding that you're in the wrong court. ***

... I'm going to just — as to the whole case. It's being dismissed because of abstention. ... * * *

B. Written Order.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

T. CARLTON RICHARDSON,)

Plaintiff,)

vs.) No. CA 96-02268 (SS)

DISTRICT OF COLUMBIA BAR, et al.)

) Filed: 01/13/97

Defendants.)

ORDER

This matter is before the Court on defendants' motion to dismiss. Plaintiff complains that an investigation by the D.C. [B]ar violated his federal Constitutional rights. The Court has held a hearing on this matter and determined that this challenge to D.C. Bar proceedings should have been brought in the District of Columbia.

The D.C. Court of Appeals has exclusive

jurisdiction over the membership of the bar. D.C. Code Ann. Sec. 11-2501(a)(1981). The plaintiff cannot circumvent the D.C. Court of Appeals' jurisdiction by suing in this Court. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). No creative pleading on plaintiff's part can bring this matter within the jurisdiction of this Court. Accordingly, it is hereby

ORDERED that this case be **DISMISSED** as to all parties.

1/10/97
Date

/s/Stanley Sporkin
Stanley Sporkin
United States Judge

II. COURT OF APPEALS.

A. Order Granting Summary Affirmance

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1996

T. CARLTON RICHARDSON,)

Plaintiff,)

vs.) No. 97-7051

DISTRICT OF COLUMBIA)
BAR, et al. Filed: 06/30/97

Defendants.)

BEFORE: Wald, Rogers, and Tatel, Circuit Judges

O R D E R

Upon consideration of the motion for summary reversal, the opposition thereto, the motion for leave to file a surreply; the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for leave to file a surreply be denied. The Clerk is directed to return the lodged surreply. It is

FURTHER ORDERED that the motion for summary reversal be denied. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir., 1987) (per curiam); Walker v.

Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980). The district court's dismissal of appellant's complaint was proper because the complaint failed to state a claim upon which relief could be granted. Appellees' alleged actions did not violate appellant's privacy rights under either the Fourth or Fifth Amendments because he neither owned nor possessed the check used to institute the investigation or the bank records which were subpoenaed. See United States v. Miller, 425 U.S. 435, 440, 442-43, 445-46 (1976); Donaldson v. United States, 400 U.S. 517, 522-24 (1971); see also In re McVane, 44 F.3d 1127, 1137-38 & n.4 (2d Cir., 1995). Moreover, because appellant had no constitutionally protected liberty or property interest in the check or bank records at issue, appellees' actions did not violate his procedural due process rights. See Miller, 425 U.S. at 443 n. 5 (bank customer not entitled to notice of bank's receipt of or intent to comply with subpoena for customer's bank records); United States v. Continental Bank & Trust Co., 503 F.2d 45, 49 (1974) (same). The court notes that appellant's reliance on the Fourteenth Amendment is misplaced, as the Fourteenth Amendment does not apply to the District of Columbia. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (applying Fifth Amendment to District of Columbia because the Fourteenth Amendment applies only to states). Likewise, appellant's recent invocation of the Privilege and Immunities Clause of Article IV, Section 2 of the Constitution is of no help to him, as that provision applies only to claims that a state illegally discriminates against nonresidents, see, Hague v. C.I.O., 307 U.S. 496, 511 (1939), and Richardson did not allege either that he is a nonresident of the District of Columbia or that appellees treated him differently from how it treats District of Columbia residents in like cases.

Finally, the allegations in the complaint provided no basis to impose common law tort

liability upon appellees for wrongful disclosure, intentional infliction of emotional distress, or wrongful interference with appellant's economic interests.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam

/s/ PMW
/s/ JWR
/s/ DST

B. Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1996

T. CARLTON RICHARDSON,)

Plaintiff,)

vs.) No. 97-7051

DISTRICT OF COLUMBIA BAR, et al.) Filed: 09/03/97

Defendants.)

BEFORE: Wald, Rogers, and Tatel, Circuit Judges

O R D E R

Upon consideration of the motion to vacate order of summary affirmance, the opposition thereto, and the reply; and the petition for rehearing, it is

ORDERED that the motion to vacate be denied. Judge Rogers was not required by 28 U.S.C. Sec. 455(a) to recuse herself from this case based merely on the fact that she previously worked with and had ultimate supervisory authority over certain parties to this appeal, as a judge's prior affiliation with an entity or persons appearing in a case does not alone constitute a reasonable basis for an objective observer to question the judge's impartiality, and the actions for which appellant seeks redress in this case did not occur while Judge Rogers was a member of the District of Columbia Court of Appeals. See, e.g., In re Apex Oil, 981 F.2d 302, (8th Cir. 1992) (denying bankruptcy debtor's motion to disqualify circuit judge from panel based on judge's former partnership in firm representing debtor's

creditors); Majer v. Orr, 758 F.2d 1578, 1583 (5th Cir. 1985) (prior service by judge as Major General in Air Force Reserve did not from a reasonable basis to question his impartiality in a case involving the Department of the Air Force); Edelstein v. Wilentz, 812 F.2d 128, 130 (3rd Cir. 1987) (judge's prior position as director of state office charged with enforcing rules governing attorney conduct was not a reasonable basis to question judge's partiality in a case challenging rule adopted by the office after the judge's departure); Barry v. United States, 522 F.2d 1094 (7th Cir), cert. denied, 429 U.S. 826 (1976) (judge's prior position as a United States Attorney does not require his or her recusal unless the case at issue arose before the judge left that position). It is

FURTHER ORDERED that the petition for rehearing be denied. Appellant's rehearing petition refers to no points of law or facts which the court overlooked or misapprehended in ruling on the merits of this appeal.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
By: /s/ Robert F. Bonner
Deputy Clerk